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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956

No. ~~1139~~ 239

CHAS. KURZ & CO., INC., as Owner of the Tank Steamer FORT FETTERMAN, *Petitioner,*

versus

THE SOUTH CAROLINA STATE HIGHWAY DEPARTMENT, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Proctor for Petitioner

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IN THE

Supreme Court of the United States

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No. _____

CHAS. KURZ & CO., INC., as Owner of the Tank Steamer FORT FETTERMAN, *Petitioner,*

versus

THE SOUTH CAROLINA STATE HIGHWAY DEPARTMENT, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioner prays that a writ of certiorari issue to review the Order of the United States Court of Appeals for the Fourth Circuit, issued on the 9th day of April, 1957, in the above entitled cause, which affirmed the Order of the United States District Court for the Eastern District of South Carolina, dated December 18, 1956.

OPINIONS BELOW

The Opinion of the United States District Court for the Eastern District of South Carolina, dated December 18, 1956, is not officially reported but is set forth in full in the an-

nexed Appendix. The Opinion of the United States Court of Appeals for the Fourth Circuit rendered on April 5, 1957, has not yet been officially reported but is set forth in full in the annexed Appendix.

JURISDICTION

The jurisdiction of this Court is invoked to review the Order of the United States Court of Appeals for the Fourth Circuit, dated April 5, 1957, upon authority of Title 28 of United States Code, Sections 1254(1) and 1651(a), and under Rule 19(b) of the Rules of the Supreme Court in relation to this Court's power of supervision over the Federal Judicial System; and particularly on the grounds that the said Court of Appeals has rendered a decision in conflict with decisions of other Courts of Appeals on similar matters, that the said Court of Appeals has decided an important question of Federal law which requires settlement by this Court, that the said Court of Appeals has decided a Federal question in a way in conflict with applicable decisions of this Court and with the rules promulgated by this Court, and that the said Court of Appeals has so far departed from the accepted and usual course of judicial proceedings or has so far sanctioned such a departure by a lower Court as to call for an exercise of this Court's power of supervision.

QUESTION PRESENTED

Whether the United States Court of Appeals for the Fourth Circuit erred in affirming the Order of the United States District Court for the Eastern District of South Carolina, denying the application of the Petitioner (Cross-Libellant below) to grant a stay of proceedings upon the Libel of the Respondent (Libellant below), pursuant to the provisions of Admiralty Rule 50.

STATUTES AND RULES INVOLVED

In Title 28 of the United States Code, under the caption "Rules of Practice in Admiralty and Maritime Cases", Rule 50 reads as follows:

Security on Cross-Libel. Whenever a cross-libel is filed upon any counterclaim arising out of the same contract or cause of action for which the original libel was filed, and the respondent or claimant in the original suit shall have given security to respond in damages, the respondent in the cross-libel shall give security in the usual amount and form to respond in damages to the claims set forth in said cross-libel, unless the court, for cause shown, shall otherwise direct; and all proceedings on the original libel shall be stayed until such security be given unless the court otherwise directs.

STATEMENT OF THE CASE

On October 5, 1955, South Carolina State Highway Department filed in the United States District Court for the Eastern District of South Carolina its Libel against the Tank Steamer FORT FETTERMAN in a cause of collision, civil and maritime. On October 19, 1955, the Highway Department served upon the Proctors for Kurz & Co. an amended Libel. The amended Libel alleged that on October 5, 1955; the FORT FETTERMAN collided with a bridge which spans the Ashley River connecting the City of Charleston with St. Andrews Parish in the State of South Carolina; that the Highway Department is a department or agency of the State of South Carolina, in which is vested the functions of maintaining and operating the State highways and bridges within that State and which is authorized by the statutes of the State to bring action in any Court of competent jurisdiction against persons damaging the highways or bridges of the State; that as a result of the collision, the Western bascule of the draw span was destroyed to the damage of the Highway Department in the sum of $250,000; that the collision and damage resulting therefrom were caused by the negligence of the FORT FETTERMAN, her Master, agents and crew. The amended Libel prayed that process be issued against the vessel, that the vessel be taken into custody by the United

States Marshal, that the Highway Department have a decree for its damages, interest and costs, and for such other and further relief as justice may require.

A monition was duly issued by the District Court in its admiralty jurisdiction, as a result of which the United States Marshal for the District, on October 5, 1955, arrested the vessel and took it into custody. Within due course, Kurz & Co. filed its claim as owner of the FORT FETTERMAN and, in order to relieve the vessel of the arrest, filed a stipulation for value and for costs in the amount of $250,000. Upon the filing of the stipulation for value and for costs, the United States Marshal released the vessel from his custody and delivered it to the owner, Kurz & Co.

In due course, Kurz & Co., as the owners of the vessel, answered the amended Libel, denying the material allegations thereof and alleging affirmatively that the collision was due to the fault of the Highway Department, its agents and servants; in so maintaining and operating the draw span of the bridge as to constitute an obstruction to water traffic on a navigable stream and especially by reason of failing to comply with the statutes and requirements of the United States applicable to the maintenance and operation of bridges across navigable streams; that the negligence of the Highway Department, its agents and servants, was the proximate cause of the collision and consequent damages.

At the same time that the amended Libel was answered, Kurz & Co. filed a Cross-Libel against the Highway Department in a cause of collision, civil and maritime. The Cross-Libel alleged that by reason of the negligence on the part of the Highway Department, its agents and servants, in the maintenance and operation of the draw span of the Ashley River Bridge, the collision referred to in the amended Libel was occasioned, as a result whereof the FORT FETTERMAN was seriously damaged, with loss to the owner in the sum of

$175,000, for which recovery, with interest and costs, was demanded.

The Highway Department moved to dismiss the Cross-Libel and filed a special plea to the jurisdiction of the Court in respect to the Cross-Libel. On April 2, 1936, the United States District Judge denied the Highway Department's motion to dismiss and overruled its special plea to the jurisdiction. The Highway Department took an appeal to the United States Court of Appeals for the Fourth Circuit from that ruling of the District Court, which appeal was dismissed on August 8, 1956 (South Carolina State Highway Department v. The Tank Steamer FORT FETTERMAN, 236 F. 2d 221), the Courts of Appeals holding that the appeal was premature. On September 11, 1956, the mandate of the Court of Appeals on that appeal was filed in the United States District Court.

On September 11, 1956, Kurz & Co. filed in the District Court its motion to stay proceedings, in accordance with the provisions of Admiralty Rule 50, upon the amended Libel until proper security shall have been given by the Highway Department to respond in damages to the claims set forth in the Cross-Libel. On December 18, 1956, the United States District Judge filed his order in which he denied the motion of Kurz & Co. to stay proceedings upon the Libel. Kurz & Co. appealed to the United States Court of Appeals for the Fourth Circuit from this order of the District Court and, on April 5, 1957, the Court of Appeals gave its decision affirming the order of the District Court. The order and judgment of affirmance by the Court of Appeals is dated April 5, 1957, and the mandate thereon to the District Court was issued on April 9, 1957.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

I.

The result of the affirmance by the Court of Appeals of the Order of the District Court is that a question in the admiralty jurisdiction of the United States Courts has been

decided in a way which conflicts with the language and intent of a rule promulgated by this Court.

Admiralty Rule 50 requires that whenever a cross-libel is filed upon any counterclaim arising out of the same contract or cause of action for which the libel was filed and the respondent or claimant in the original suit shall have given security to respond in damages, the respondent in the cross-libel shall give security in the usual amount and form to respond in damages to the claims set forth in the said cross-libel, unless the Court for cause shown shall otherwise direct, and that proceedings on the original libel shall be stayed until such security shall be given unless the Court otherwise directs. In this case the Petitioner filed its cross-libel upon a counterclaim arising out of the same cause of action for which the original libel was filed, and, having given security under compulsion to respond in damages in the original suit, applied to the District Court to stay proceedings on the original libel until the respondent in the cross-libel should give security in the usual amount and form to respond in damages to the claims set forth in the cross-libel. The District Court refused to grant the stay and the Court of Appeals affirmed this action.

The clear intention of Admiralty Rule 50 is to place the parties to an action, under circumstances such as are here involved, on an equal position as regards security in respect to the payment of any money judgment that the Court might award. In *Washington-Southern Nav. Co. v. Baltimore & P.S.B. Co.*, (1924) 263 U. S. 629, 68 L. Ed. 480, this Court took occasion to discuss the origin and purpose of the rule. In that case, the libellant proceeded against the respondent in personam, but the respondent voluntarily gave security to respond in damages to the libellant and then moved for a stay of proceedings upon the libel until the libellant should give security to pay the claims set forth in the cross-libel. The District Court granted the stay but the Court of Appeals

doubted that security would be required of the original libellant under these circumstances and certified the question to the Supreme Court to review the order of the District Court. The Supreme Court reversed the order of the District Court, holding that since the original respondent was not required to give security the cross-respondent should not be required to give security, for to require otherwise would be to defeat rather than to carry out the purpose of the rule. It was said by the Court that the rule was not designed to introduce any new practice concerning cross-libels but to formulate the practice which had become settled, the purpose being to place the parties on an equality as regards security. The clear implication to be derived from the decision is that equality of treatment requires that security be given by a cross-respondent where the original respondent was compelled, as in the case at bar, to furnish security.

The rule permits the admiralty court to refrain from ordering a stay and the giving of security by the cross-respondent where cause is shown for directing otherwise. The Court of Appeals and the District Court have wrongly interpreted this provision of the Rule to mean that the Court has discretion to deny the stay although the parties are not found to be, or may not otherwise be placed, on a basis of equality as regards security. The rule does not authorize the Court to refuse to place the cross-libellant on a basis of equality with the libellant as regards security; the language and intent of the rule contemplates that the equality of treatment shall be accomplished either by means of the stay or by the Court, for cause shown, "otherwise" directing. The Petitioner respectfully contends that the stay contemplated by the rule shall be granted unless it has been made to appear that the parties can otherwise be placed, or are, on a basis of equality as regards security.

The reason given by the Court of Appeals for affirming the denial of the stay by the District Court is that "it is hardly

conceivable that a state of our Union would fail to abide by a judgment of a Court after invoking its jurisdiction for the adjudication of a controversy" and that hence a bond is not necessary to protect the rights of the Petitioner. It is stated in the opinion of the Court of Appeals that "this was the position taken at the bar of this Court by the Attorney General of the State." The holding of the Court of Appeals implicity recognizes that inequality of treatment between the parties here litigant will exist, but appears to justify such inequality of treatment on the theory that a sovereign litigant is to be accorded special privilege.

The statement of the Attorney General of the State at the bar of the Court was that the Highway Department had been given no legislative authority to pay, or to guarantee payment, to the Petitioner in respect to any judgment that it might obtain against the Highway Department in this controversy but that, should the Court finally decree that judgment was to be awarded in favor of the Petitioner against the Highway Department, the proper administrative officer of the State would then apply to the State Legislature for an appropriation to pay the judgment. The result of the situation as it now stands is that the Petitioner is in no way assured of the payment of any judgment that may be awarded in its favor and will be required to depend upon the whim of a future State Legislature as to whether it will make appropriate provision to pay a judgment already obtained against its Highway Department. This is very different from the security bond given by the Petitioner to the Highway Department to guarantee payment of any sum recovered upon the original libel and places the parties on a completely unequal basis as regards security. The Petitioner has been compelled to give absolute and unconditional assurance for the payment of any judgment which may be recovered by the Highway Department, while the Highway Department offers no more than verbal assurance by an officer of the State that if judgment is recovered against the State it will be paid upon the condition that the State

Legislative body is hereafter willing to authorize that this shall be done. Such a gesture by the Highway Department is far from the security contemplated by Rule 50 and constitutes no basis for a summary refusal of the relief which the Rule provides.

II.

The decision of the Court of Appeals in the matter here presented is in conflict with decisions of this Court and with decisions of other Courts on similar matters. The Court of Appeals in this case has adopted the view that because the State of South Carolina, through its agency, the Highway Department, is the libellant and cross-respondent, it must, by reason of its sovereignty, receive different treatment than would a private litigant in the same circumstances.

The same untenable proposition was presented to this Court in *Luckenbach SS Co. v. Norwegian Barque Thekla*, (1924) 266 U. S. 328, 69 L. Ed. 313, when the United States was the libellant. In that case the sovereign (the United States), through its agency the United States Shipping Board Emergency Fleet Corporation, was required by the District Court to post security for the assurance of payment to the cross-libellant of any claims which might be established in the controversy against the United States. It was held by this Court that "when the United States comes into Court to assert a claim, it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter" and it was therefore held that the United States, being at fault, should pay the claim of the cross-libellant and that the security given by the Emergency Fleet Corporation was valid and was responsible for payment of the judgment.

The District Court for the Southern District of New York had before it for decision a question similar to that here presented, except that the sovereign libellant in that case was the United States instead of the State of South Carolina, in *Re: The Gloria* (1919) 267 F. 929. Judge Learned Hand

held that the United States could be proceeded against upon cross-libel and granted a stay of proceedings upon the libel until the United States should furnish security to assure the cross-libellant of the payment of its claims upon the cross-libel. The following is quoted from the opinion:

> The purpose of the rule, which is only to subject the original libellant to just conditions in the prosecution of his libel, cannot possibly be realized unless in such cases he be compelled to consent to give the same security which he would have had to give, had the cross-libellant been able to arrest the ship. This, of course, does not trench upon the libellant's immunity from process, if he have any, because the rule does not attempt to acquire jurisdiction over him at all, though that is the uniform practice in equity. Street's Federal Equity Practice, Sec. 1066. It operates only through the sanction of a stay of his main suit leaving him free to abandon, though he has begun, his own libel without remaining liable under the cross-libel.

The holding of Judge Hand was adopted and restated by Circuit Judge Mack in *The Gloria, The Thekla, The F. J. Luckenbach* and *Kingdom of Norway v. Federal Sugar Refining Co.*, in a consolidated decision (1923) 286 F. 188, wherein the Court denied motions of the United States to dismiss the cross-libels. In connection with the applicability of Admiralty Rule 53 (now Admiralty Rule 50), Judge Mack said (at page 203):

> * * * The question whether Rule 53 should be interpreted as applying to the Government and requiring it, in order to prevent a stay of the original proceedings, to give security to answer the cross-libel is not an easy one. On the one hand, it may be urged that the rule is an indirect method of enforcing the execution of a judgment against the Government. On the other hand, it may be said that the Government need not continue

the litigation, and, if it does, it must comply with the rules of the forum. On the whole, I think the decision of the English Courts in The Newbattle, supra, correct, and in any event I should not be justified in reversing the considered decisions of Judge Hand and Judge Hough in the earlier stages of the proceedings.

In Judge Mack's opinion *In Re: The Gloria*, et als., supra, there is quoted a portion of the opinion handed down by the English Court of Appeals in *The Newbattle*, 10 Prob. Div. 33, 5 Aspinall Maritime Cases N. S. 356 (1885). In that case the Belgian Government libeled a privately owned British vessel for damages sustained by one of its ships as a result of collision and the British owners filed a cross-libel and applied for stay of the original proceedings until security was given for the cross-libel. The English Court of Appeals unanimously held that the original proceedings should be stayed pending the giving of security to answer the cross action and said, in part, as follows:

> It seems to me that this case is clearly within the words of the Act of Parliament. What is there to take it out of the section? It is said that this order ought not to have been made on a sovereign prince. There are some orders which ought not to be made on a sovereign prince, but there are some which ought. ° ° ° It, however, has always been held that if a sovereign comes into an English Court as plaintiff, and avails himself of its procedure, the Court may make all proper orders against him. ° ° ° In this case, the plaintiff having instituted his action in the English admiralty court, an order that he shall be restrained from proceeding until he gives security to answer the defendants' counterclaim is not in my opinion an order which touches his dignity. The court may very well do that within the comity of nations. The plaintiff has submitted himself to the jurisdiction of the Court by instituting his action, and there-

> fore the Court says, "We will not exercise our jurisdiction in your favor unless you give security." * * * * We, however, do not anticipate that if the judgment goes against the King of the Belgians he will not pay.

It is significant that the English Court, while expressing the view that the Belgian Government would pay any judgment awarded against it, nevertheless required the Belgian Government to give security for the payment of claims upon the cross-libel. While Judges Hand, Hough and Mack must have anticipated that the Government of the United States would pay any judgment that the United States Admiralty Courts might award against it, they nevertheless required the United States to give security as a condition to proceeding upon its libels. As pointed out above, this Court affirmed their holdings on the subject in *Luckenbach S. S. Co. v Norwegian Barque Thekla*, supra.

III

The issue decided by the Court of Appeals and here presented, is an important question of Federal Law which requires settlement by this Court. Furthermore, the affirmance order of the Court of Appeals sanctioned a departure by a lower court from the accepted and usual course of judicial proceedings, which calls for an exercise of this Court's power of supervision.

The provisions of Admiralty Rule 30 have consistently been applied by this Court and by the inferior Courts of the United States to bring about equality of treatment to litigants coming within the admiralty jurisdiction. *Washington-Southern Nav. Co. v. Baltimore P. S. B. Co.*, supra; *The Gloria*, supra; *Genther v. Wiley*, 35 F 797; *The Toledo*, 1 Brome's Adm. 415, Fed. Cas. No. 14,077; *Vranello v. The Credit*, 15 F. 637; *Empressa Maritima v. North & South American Steam Nav. Co.*, 16 F. 502; *Electro-Dynamic Co. v. The Electran*, 48 F. 689; *Old Dominion S. S. Co. v. Kafahl*, 100 F. 331; *Loclimore*

S. S. Co. v. Hagar 78 F. 642; *Partemecederie v. The Pioneer*, 120 F. Supp. 525; *Mianos Yacht Club Yard Corp. v. The Blue Cloud*, 114 F. Supp. 936. The uniform application of the maritime laws and procedures should not be departed from merely because one of the litigants happens to be a sovereign; a sovereign cannot place itself conditionally within the admiralty jurisdiction. It has been repeatedly held that when a sovereign is within the jurisdiction of admiralty it may not prescribe the rules under which it shall proceed, and it is to be treated consistently with those laws and rules uniformly applied in maritime actions. *Workman v. New York*, (1900) 179 U. S. 552, 45 L. Ed. 314.

There is no reason why one of the states of the United States should be accorded different rights because of its sovereignty than is accorded other sovereigns. As heretofore mentioned in this discussion, the admiralty Courts have required that the United States and the Belgian Government be subjected to a stay of proceedings, unless they should give security to a cross-libellant. The sovereign position of the state is the same as that of the United States and whatever principle is applicable to the one is likewise applicable to the other. *The Charlotte*, 259 F. 593; *Williams v. United States*, 74 U. S. 152, 19 L. Ed. 129 (1869) and *Re: State of New York*, 256 U. S. 490, 65 L. Ed. 1057 (1921). Under the accepted and usual course of judicial proceedings, a state, as well as any other soverign, would be compelled to give security to a cross-libellant as a condition to proceeding further in an admiralty action which it has commenced, and the Court of Appeals has here sanctioned a departure from that accepted and usual course, which requires that this Court exercise its power of supervision to correct the obvious inconsistency.

The various states, and particularly those on the seaboards, are increasingly participating in the maritime field of operations in which private concerns formerly functioned almost exclusively. With this trend it becomes more important that

this Court should settle questions relating to the position of a state which seeks recourse to the admiralty processes by instituting action. The State has the option of not placing itself in the admiralty jurisdiction or withdrawing from a proceeding which it has begun, but if it desires to avail itself of the admiralty jurisdiction to a conclusion, it should be subject to all of the prescribed laws and rules which the admiralty jurisdiction provides. It is especially important that this Court should determine whether the proposition decided by the Court of Appeals in this matter is to be recognized as an exception to the principle that a litigant, be it private or sovereign, must abide by all of the laws and rules applicable in respect to maritime matters when it is in the admiralty jurisdiction.

The State Legislatures may not change or limit the laws applicable in maritime matters as established by the admiralty courts of the United States so as to restrict or impair the uniform application of those laws. *Workman v. New York*, supra; *Southern P. Co. v. Jensen*, 244 U. S. 205, 61 L. Ed. 1086; *Union Fish Co. v. Ericksen*, 248 U. S. 308, 63 L. Ed. 261, *Knickerbocker Ice Co. v. Stewart*, 253, U. S. 149, 64 L. Ed. 834; *Chelantis v. Luckenbach S. S. Co.* 247 U. S. 372, 62 L. Ed. 1171. If, therefore, a state decides to avail itself of the benefits it may derive by submitting a matter in which it is involved to the admiralty courts, it must do so without imposing a limitation in respect to the application of the established maritime rules relating to such litigation. *Re: The State of New York*, supra; *The Gloria*, supra.

If this cause is allowed to proceed in the District Court without the state having given security to pay such claims as may be awarded upon the cross-libel, the Petitioner can never be assured that a judgment obtained by it will be paid. The Petitioner has been required by the decision of the Court of Appeals to rely upon the nebulous hope that the legislative body of the state will do what may become necessary for it

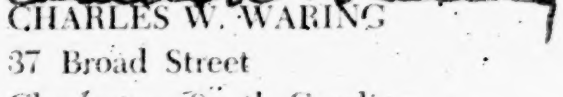
to do in order to comply with such judgment as the admiralty Court might render. The legislative body, by inaction, could leave the Petitioner without remedy despite the judgment which the admiralty Court might render in its favor. If the state must be prepared ultimately to make payment to the Petitioner of such judgment as this Court might render, there is no apparent reason why it should not now give assurance that it will do so. Unless a stay of proceedings is now granted, such assurance of payment to the Petitioner will be forever lost and the Court of Admiralty will have no means by which it may aid the Petitioner to collect upon a judgment, should judgment be rendered in favor of the Petitioner. The inequity resulting to the Petitioner is obvious and this is particularly the case when it is considered that the Highway Department has a further option of discontinuing the entire litigation, while this alternative is not available to the Petitioner.

Equality of treatment, insofar as security is concerned, requires that each party should know before trial whether the payment of its ultimate recovery will be made. There can be no equality of treatment where one party is permitted to go forward with full assurance of payment while the other party does not know whether or not payment to him will be forthcoming. The secured party risks nothing in pursuing his claim to its final conclusion, whereas the unsecured party must pause to consider whether uncertainty of payment warrants the expense of attempting to press his claim. The advantage of the secured party is seriously prejudicial to the unsecured party.

The Highway Department should not have the advantage of proceeding to the final adjudication of its claim, with full assurance of the ultimate payment, while the Petitioner remains unsecured and must take its chances as to whether it will be paid should it recover. The protection contemplated by the provisions of Rule 30 should be given before trial to

correct the disadvantageous position of the Petitioner and to allow both parties to go forward on an equal basis.

Respectfully submitted,



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APPENDIX

IN THE

Supreme Court of the United States

October Term, 1956

CHAS. KURZ & CO., INC., as Owner of the Tank Steamer FORT FETTERMAN, *Petitioner,*

versus

THE SOUTH CAROLINA STATE HIGHWAY DEPARTMENT, *Respondent*

Decision of the United States Court of Appeals for the Fourth Circuit Dated April 5, 1957

After the premature appeal in this case was dismissed (See 236 F. 2d 221), the cross libellant filed a motion to stay proceedings upon the libel until the libellant should give security to respond in damages to the claims set forth in the cross libel. The District Judge denied the motion on the ground that the libellant was an agency of the State of South Carolina, that there was a substantial question as to the power of any official of the state to execute such bond, and that the cross libellant would not suffer injury as a result of such bond not being given, since it was inconceivable that the State of South Carolina, having invoked the jurisdiction of the court, would not comply with any judgment that might be rendered in the cause. He accordingly held that the case was a proper one for the exercise of the discretion vested in him by Rule 50 of the Admiralty Rules not to require the filing of bond by the libellant. The cross libellant has appealed from the order denying the motion.

Assuming that appeal lies from such an order denying stay of proceedings, we do not think that there was any abuse of discretion in the entry of that order. As said by the judge below, it is hardly conceivable that a state of our union would fail to abide by a judgment of a court after invoking its jurisdiction for the adjudication of a controversy; and this was the position taken at the bar of this court by the Attorney General of the state. If bond is not necessary to protect the rights of the cross libellant, the proceedings in court ought not be delayed by a requirement that such a bond be executed. The order appealed from will accordingly be affirmed and mandate will issue forthwith in order that there may be no further delay in the hearing of the case.

Affirmed.

ORDER OF THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA DATED DEC. 18, 1956

On October 5, 1955, the libellant, the South Carolina State Highway Department, hereinafter called the Highway Department, filed a libel in this court, alleging that it is a department or agency of the State of South Carolina in whom is vested the function of constructing and maintaining state highways and bridges, and that it is authorized by the statutes of South Carolina to bring the suit for injury and damage occasioned by the collision of the Tank Steamer Fort Fetterman with the westward portion of the drawbridge which spans the Ashley River and connects the City of Charleston with St. Andrews Parish. The libel further alleged that the collision and resulting damages were due to the negligence of the vessel, her master, agents and crew, and that the cost of effecting repairs to the bridge by reason of the collision would amount to not less than $200,000, later amended to $250,000.

Upon the filing of the libel, the Highway Department filed a stipulation for costs and deposited a certified check for $250 to take the place of a cash bond. On October 20, 1955, Charles Kurz & Co., Inc., hereinafter called the shipowner, filed a bond with surety, in the sum of $250,000, reciting that the vessel involved was in the custody of the marshal under process issued in the cause and that the value thereof had been fixed, by agreement with the proctors for the libellant, to be the sum of $250,000. The bond was conditioned for the payment of the amount that may be awarded by a final decree in the cause. On November 4, 1955, the shipowner filed its answer to the amended libel and also a cross-libel in which it admitted that the libellant is a department or agency of the State of South Carolina, and alleged that the vessel had been damaged in the collision, and that such damage was caused solely by the negligence of the Highway Department, in the sum of $175,000. On November 9, 1955, the Highway Department filed its reply, subject to a special plea to the jurisdiction of the Court as to the cross-libel, denying that the collision was caused by the negligence of the Highway Department, and moved to dismiss the cross-libel because the Highway Department is a department or agency of the State of South Carolina, and the State had not given its consent to be sued in this Court by reason of any alleged damages suffered by the shipowner. On April 2, 1956 this Court by its order denied the motion of the cross-libellant for a dismissal of the cross-libel and overruled the special plea of the Highway Department to this Court's jurisdiction. On April 19, 1956 an appeal was taken from this order by the Highway Department and an appeal bond in the sum of $250 was filed by it, with United States Fidelity and Guaranty Company, as surety, conditioned for the payment of the costs that may be awarded against the appellant if the appeal should not be sustained. The bond was approved as to form and amount and sufficiency of surety by the proctors for the shipowner. On August 8, 1956 the appeal was dismissed upon the ground

that it was premature. On September 10, 1956 the mandate was issued by the Court of Appeals. On September 12, 1956 the shipowner filed a motion to stay the suit until proper security shall have been given by the Highway Department to respond in the damages set forth in the cross-libel. On September 13, 1956 the Highway Department filed its return alleging that there was no authority, statutory or otherwise, under which the State Highway Department can legally furnish security; that there was no state appropriation or other authorization to provide for the security by the state or any agency thereof; that the furnishing of such security by the State or any agency thereof would amount to an unconstitutional incurring of indebtedness by the State; that the motion of the shipowner came too late and should be denied because of its laches and waiver.

A number of interesting legal questions have been raised by counsel for the respective parties but, in view of my conclusion to exercise my discretion in not directing the proceeding to be stayed until a bond is given by the Highway Department, I do not find it necessary to pass upon these questions. I may say, however, that I do not believe that there have been any laches in this matter on the part of the shipowner, inasmuch as the instant motion was made two days after the mandate was sent down by the Court of Appeals, and the Highway Department was not in any way prejudiced or injured because of the failure to make the motion before then. As is said in the case of the *United States v. Alex Dussel Iron Works, Inc.*, 31 F. 2d 535, 536:

> "Laches consists of two elements; inexcusable delay in instituting suit and prejudice resulting to the defendant from such delay. Its existence depends upon the equities of the case, and not merely upon the lapse of time."

Nor do I believe that the fact that the shipowner voluntarily gave bond to secure the payment of any judgment that may

be recovered against it would deprive it of the benefits to which it is entitled under Admiralty Rule 50, inasmuch as it was required to give bond to obtain a release of the vessel seized under process of this Court.

As was said by Judge Holtzoff in the case of *Mianos Yacht Yard Corporation v. The Blue Cloud et al*, 114 F. Supp. 931, 932:

> "The real purpose of the motion seems to be to avoid compliance with Admiralty Rule 50, 28 U.S.C.A., which requires the libellant to file security to respond in damages sought in the cross-libel under the penalty of a stay of proceedings. This provision applies, however, only if the cross-libellant has previously given security under compulsion to obtain the release of the vessel. *The libellant having exacted such security should not in justice complain if he, in turn, is required to do likewise in respect to the damages claimed in the cross-libel.*" (Emphasis added.)

Admiralty Rule 50 provides:

> "Whenever a cross-libel is filed upon any counterclaim arising out of the same contract or cause of action for which the original libel was filed, and the respondent or claimant in the original suit shall have given security to respond in damages, the respondent in the cross-libel shall give security in the usual amount and form to respond in damages to the claims set forth in said cross-libel, unless the court for cause shown, shall otherwise direct; and all proceedings on the original libel shall be stayed until such security be given unless the Court otherwise directs."

In the case of the *City of Beaumont* (CCA. 4) 8 F. 2d 599, the master of ship instituted a libel against the cargo owner to recover freight money. The cargo owner, upon the seizure

of the cargo, gave a release bond and the cargo was released. The cargo owner then filed a cross-libel against the ship for damages for transportation of the cargo and losses in connection therewith, and obtained an ex parte order directing that the proceedings on the original libel be stayed until and unless security was given by the ship to protect the libellant in the cross-libel. The master of the ship moved the Court to vacate the order staying the original libel proceeding. He averred that the ship was unable to give bond and that its owner was insolvent and could not do so. The District Court then vacated the order staying the original libel proceeding. In affirming the order of the District Court, the Court of Appeals for this Circuit said:

> "The purpose of the rule was manifestly to place the parties, the libellant and cross-libellant, on an equality regarding security, as far as the same could be accomplished; but it never meant to do more than could reasonably and lawfully be done to that end, within the discretion of the court, under carefully prepared rules prescribing the rights of the parties litigant and seeking to safeguard and preserve the same.
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> "The rule never contemplated, as is insisted in the second position stated, that, where the parties to the original libel had established their rights and obtained security, this should be lost to them, because of their inability, arising from insolvency or other good reason, to procure a bond to respond to a large claim asserted in the cross-libel, and as a result their libel should be dismissed. This would not only be unjust, but would in effect negative and nullify the provision of the rule giving to the trial court full discretion to act upon the very subject involved, and would be entirely contrary to the ruling of the Supreme Court in the recent case hereinabove cited."

The attorney general of the State of South Carolina sub-

mitted a memorandum to this Court stating that it is the State's contention that there is no authority for the State Highway Department to execute such a bond, and in its return, signed by the State's attorney general, the Highway Department alleged that there was no authority, statutory or otherwise, under which the Highway Department can legally furnish security, and that there is no State appropriation or other authorization to provide for the security by the State or any agency thereof.

While I do not feel that I am called upon, at this time, to pass upon the question as to the power of the Highway Department, an agency of the State, to execute the bond in question, nevertheless, I am of the opinion that the question raised is of such substantial character that I would not be warranted in requiring any state agency to assume the responsibility of executing such bond, in the light of the opinion of the State's attorney general that there was no authority for such execution. Furthermore, because of the opinion expressed by the attorney general, it would, in all probability, be difficult, if not impossible, to get a surety company to execute such bond because such surety company would then, in my opinion, become liable under the bond even though it may not be enforceable against the Highway Department or the State of South Carolina because of the lack of authority of its agents to execute such bond.

In 50 American Jurisprudence, page 999, it is stated:

> "Incapacity of Principal to Contract.—As an exception to the rule that the surety may plead any defense available to the principal, it is in general held that the surety may not avail himself of a defense which is purely personal to the principal, as, for example, the personal incapacity of the principal."

See also 24 A.L.R., page 839, wherein the author states:

> "The courts are agreed that where there is no fraud,

> duress, deceit, or violation of law in procuring the contract, the surety or guarantor of a principal who is incapable of contracting is bound, although the principal is not."

The author cites a number of authorities in support of that statement, including the case of *Smyley v. Head*, decided by the South Carolina Supreme Court, and reported in 2 Richardson 590.

In the light of the foregoing, I am of the opinion that this is a proper cause for the exercise of discretion by the Court not to require the giving of a bond by the Highway Department.

The shipowner called the Court's attention to the fact that the giving of security for costs is a condition precedent to pursuing a remedy in the Court of Admiralty, and that the Highway Department considered that it had authority so to do when it furnished security for costs and posted a stipulation to guarantee the payment thereof. However, as pointed out above, the stipulation for costs was accomplished by a certified check to take the place of a cash bond. As is said by the Supreme Court in the case of *Merchants Bank v. State Bank*, 10 Wall. 604:

> "The object of certifying a check, as regards both parties, is to enable the holder to use it as money. The transferee takes it with the same readiness and sense of security that he would take the notes of the Bank. It is available also to him, for all the purposes of money."

I am inclined to the view that, in any event, the shipowner will not suffer any injury because of the failure of the Highway Department, an agency of the State, to give such bond. The State of South Carolina will, no doubt, carry out its obligation and provide for the payment of any judgment that may be awarded against it in this proceeding. It is inconceivable that the State, through its agency and its at-

torney general would come into Court and seek justice therein, and that it would refuse to do justice and to comply with the judgment of this Court if it should adjudge that the State sustained no damage as a result of the negligence of the shipowner, but that the shipowner suffered damage as a result of the negligence of the State's agency. It is therefore;

ORDERED that the motion to stay proceedings herein until a bond is given by the cross-respondent be and hereby is denied.

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